



PUBLIC NOTICE

Federal Communications Commission

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DA 01-722

March 30, 2001

COMMON CARRIER BUREAU SEEKS COMMENT ON LETTERS FILED BY VERIZON AND BIRCH REGARDING MOST-FAVORED NATION CONDITION OF SBC/AMERITECH AND BELL ATLANTIC/GTE ORDERS

CC Docket No. 98-141

CC Docket No. 98-184 ✓

Comments Due: April 30, 2001

Reply Comments Due: May 14, 2001

The Commission approved the applications for transfer of control of licenses and lines associated with the proposed mergers of SBC/Ameritech and Bell Atlantic/GTE subject to conditions designed to offset the public interest harms associated with the transactions.¹ Among these conditions is a "most favored nation" (or "MFN") requirement designed to lower barriers to entry and to spread the use of best practices.²

The *Bell Atlantic/GTE Merger Order* requires Verizon Communications, Inc. ("Verizon") to make available

(1) in the Bell Atlantic Service Area to any requesting telecommunications carrier any interconnection arrangement, UNE, or provisions of an interconnection agreement (including an entire agreement) subject to 47 U.S.C. § 251(c) and Paragraph 39 of these Conditions that was voluntarily negotiated by a Bell Atlantic incumbent LEC with a telecommunications carrier, pursuant to 47 U.S.C. § 252(a)(1), prior to the Merger Closing Date and (2) in the GTE Service Area to any requesting telecommunications carrier any interconnection arrangement, UNE, or provisions of an interconnection agreement subject to 47 U.S.C. § 251(c) that was

¹ Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, CC Docket 98-141, *Memorandum Opinion and Order*, 14 FCC Rcd 14712, Appendix C, (1999) ("*SBC/Ameritech Merger Order*"); GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, CC Docket No. 98-184, *Memorandum Opinion and Order*, 15 FCC Rcd 14032, Appendix D (rel. Jun. 16, 2000) ("*Bell Atlantic/GTE Merger Order*").

² See, e.g., *Bell Atlantic/GTE Merger Order*, 15 FCC Rcd 14171, para. 300.

voluntarily negotiated by a GTE incumbent LEC with a telecommunications carrier, pursuant to 47 U.S.C. § 252(a)(1), prior to the Merger Closing Date, provided that no interconnection arrangement or UNE from an agreement negotiated prior the Merger Closing Date in the Bell Atlantic Area can be extended into the GTE Service Area and vice versa.³

The *SBC/Ameritech Merger Order* requires SBC Communications Inc. ("SBC") to make available

to any requesting telecommunications carrier in the SBC/Ameritech Service Area within any SBC/Ameritech State any interconnection arrangement or UNE in the SBC/Ameritech Service Area within any other SBC/Ameritech state that (1) was negotiated with a telecommunications carrier, pursuant to 47 U.S.C. § 252(a)(1), by an SBC/Ameritech incumbent that at all times during the interconnection agreement negotiations was an affiliate of SBC and (2) has been made available under an agreement to which SBC/Ameritech is a party.⁴

On February 20, 2001, Verizon asked the Bureau to clarify that the Verizon MFN condition does not apply to provisions of an agreement that address intercarrier compensation for Internet-bound traffic.⁵ On March 6, 2001, Birch Telecom, Inc. filed a letter asking the Bureau to interpret the relevant SBC merger condition as permitting it to incorporate a provision relating to reciprocal compensation from an existing agreement with Sage Telecom, Inc., approved by the Texas Public Utility Commission, into current or future interconnection agreements in Oklahoma, Texas, Kansas, and Missouri.⁶

We seek comment on both letters and as to whether there are grounds to waive or modify the relevant MFN conditions.

As a "permit but disclose" proceeding, *ex parte* presentations will be governed by the procedures set forth in Section 1.1206 of the Commission's rules applicable to non-restricted proceedings.⁷

Parties making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is

³ *Bell Atlantic/GTE Merger Order* at Appendix D, para. 32.

⁴ *SBC/Ameritech Merger Order* at Appendix C, para. 43.

⁵ Letter from Gordon Evans, Vice President, Federal Regulatory, Verizon, to Dorothy Attwood, Chief, Common Carrier Bureau at 3 (Feb. 20, 2001).

⁶ Letter from John Ivanuska, Vice President, Regulatory & Carrier Relations, Birch, to Carol E. Matthey, Deputy Chief, Common Carrier Bureau, FCC (March 6, 2001).

⁷ An *ex parte* presentation is any communication (spoken or written) directed to the merits or outcome of a proceeding made to a Commissioner, a Commissioner's assistant, or other decision-making staff member, that, if written, is not served on other parties to the proceeding or, if oral, is made without an opportunity for all parties to be present. 47 C.F.R. § 1.1201.

generally required.⁸ Other rules pertaining to oral and written presentations are set forth in Section 1.1206 (b) as well. Interested parties are to file with the Commission Secretary, Magalie Roman Salas, 445 12th Street S.W., Washington, D.C. 20554, and serve Debbi Byrd of the Accounting Safeguards Division, Common Carrier Bureau, 445 12th Street S.W., 6-C316, Washington D.C. 20554, and International Transcription Service, Inc., 445 12th Street, S.W., CY-B402, Washington, D.C. 20554, with copies of any written *ex parte* presentations in these proceedings filed in the manner specified above.

Interested parties may file comments not later than April 30, 2001. Responses or oppositions to these comments may be filed not later than May 14, 2001. In accordance with Section 1.51(c) of the Commission's Rules,⁹ an original and four copies of all pleadings must be filed with the Commission's Secretary, Magalie Roman Salas, 445 12th Street, S.W., TW-A325, Washington, D.C. 20554. In addition, copies of each pleading must be filed with other offices in the following manner: (1) one copy with International Transcription Service, Inc., the Commission's duplicating contractor, 445 12th Street, S.W., CY-B402, Washington, D.C. 20554, (202) 857-3800; (2) one copy with Mark Stone, Accounting Safeguards Division, Common Carrier Bureau, 445 12th Street, S.W., Room 6-C365, Washington, D.C. 20554; and (3) six copies with Debbi Byrd, Accounting Safeguards Division, Common Carrier Bureau, 445 12th Street, S.W., Room 6-C316, Washington, D.C. 20554.

In addition to filing paper comments, parties may also file comments using the Commission's Electronic Comment Filing System (ECFS).¹⁰ Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. For filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov and should include the following words in the body of the message: "get form <your e-mail address.>" A sample form and directions will be sent in reply.

Copies of the applications and any subsequently filed documents in this matter may be obtained from International Transcription Service, Inc., 445 12th Street, S.W., CY-B402, Washington, D.C. 20554, (202) 857-3800. Electronic versions of the applications are also available on the FCC's Internet Home Page (<http://www.fcc.gov>) and through the Commission's Electronic Comment Filing System. To the extent that parties file electronic versions of responsive pleadings, such filings also will be available on the FCC's Internet Home Page and through the Commission's Electronic Comment Filing System. Copies of the applications and documents are also available for public inspection and copying during normal reference room hours at the Commission's Reference Center, 445 12th Street, S.W., CY-A257, Washington, D.C. 20554.

For further information, contact Mark Stone at (202) 418-0816.

Action by the Deputy Chief, Common Carrier Bureau.

⁸ See 47 C.F.R. § 1.1206(b)(2).

⁹ 47 C.F.R. § 1.51(c).

¹⁰ See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24,121 (1998).

Gordon R. Evans
Vice President
Federal Regulatory



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FEB 20 2001

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February 20, 2001

Ms. Dorothy Attwood, Chief
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, N.W.
Washington, D.C. 20554

Re: Focal MFN Request

Dear Ms. Attwood:

By this letter, Verizon requests that you review and clarify the attached informal staff opinion letter, responding to a request by Focal Communications ("Focal Response"), which addressed the scope of the most-favored nation ("MFN") provisions of the *Bell Atlantic/GTE Merger Order*, FCC 00-221 (rel. June 16, 2000).

By way of context, Focal's letter argued that the expanded MFN provision in the merger conditions should be construed to allow it to adopt a provision in a 1998 agreement from another state that provided for the interim payment of inter-carrier compensation on Internet-bound traffic. That interim provision provided for the payment of compensation only until the date of an FCC order in the then-pending declaratory ruling proceeding. The Commission subsequently decided that case, holding that Internet traffic was not local. The issue here arises because, while Verizon has permitted Focal to adopt all of the other provisions of the agreement at issue, we did not agree that Focal could adopt the single provision that addressed compensation for Internet traffic. As we explained in our response to Focal's letter, we believe that the interim provision addressing compensation for Internet traffic is not subject to the expanded MFN conditions for several independent reasons.

The Focal Response addressed only one of the reasons that the disputed provision is not subject to the expanded MFN condition. Specifically, it addressed the issue of whether the expanded MFN condition allows a carrier to adopt those provisions of a negotiated interconnection agreement from another state that address only matters that are subject to section 251(c) – as the conditions expressly state – or whether the expanded MFN conditions also apply to matters subject to section 251(b). The Focal Response interpreted the condition broadly to apply to provisions that address matters covered by section 251(b). In reaching that conclusion, we believe that the Focal Response failed to consider the policy implications of interpreting the merger conditions in such a broad fashion and failed to take into account the specific language of the *Bell Atlantic/GTE merger conditions*.

First, in terms of the broader policy implications, the sole issue in dispute between the parties was whether an interim provision that dealt with the issue of inter-carrier compensation on Internet traffic is subject to the expanded MFN condition. As you are aware, some states have ordered inter-carrier compensation payments for Internet-bound traffic, while other states have found that requiring such payments would inhibit the development of local competition and, therefore, have refused to order them. In light of the D.C. Circuit Court's remand, the Commission is currently considering the appropriate federal legal and policy response to the problems created when so-called "reciprocal compensation" obligations are imposed on the ever-growing volume of one-way calls to the Internet. As the Commission considers whether and how to remedy the significant market distortions that result from imposing reciprocal compensation obligations on such traffic, it makes no policy sense to exacerbate the problem by allowing a carrier to import into additional states an inter-carrier payment provision for Internet-bound traffic. This is particularly the case where the second state has found that imposing reciprocal compensation obligations on Internet-bound traffic results in uneconomic arbitrage that deters local competition and has refused to require reciprocal compensation payments on such traffic.

Second, from a legal standpoint, we believe that the Focal Response also failed to give effect to the express language of the merger conditions. Paragraph 30, 31(a), and 32 of those conditions each contains identical language allowing a carrier to adopt in another state "any interconnection arrangement, UNE, or provisions of an interconnection agreement (including an entire agreement) *subject to 47 U.S.C. § 251(c)* and paragraph 39 of these Conditions" that were negotiated after the closing date (emphasis added).

In construing the terms of the conditions, the Focal Response initially suggests that the parenthetical phrase might be read disconnected from the succeeding language that explicitly states that the adoption right extends only to obligations subject to section 251(c). As a result, it suggests that the parenthetical might be read separately from the rest of the sentence to expand the scope of the condition to cover all of the provisions of an interconnection agreement, including those that go beyond the matters addressed by section 251(c).

Of course, if that were true, there would be no logical stopping point. Indeed, if the parenthetical were read in a manner divorced from the rest of the sentence, it would mean that all of the provisions included in an interconnection agreement would be subject to the expanded MFN condition, even if individual provisions were entirely unrelated to the requirements of any provision of section 251.

As a result, the Focal Response itself appears to recognize that such an overbroad construction of the condition is untenable, and that the parenthetical – "(including an entire agreement)" – cannot reasonably be read disconnected from the reference to section 251(c). Instead, the Focal Response ultimately bases its conclusion on the notion that section 251(c) somehow incorporated 251(b) by reference, simply because section 251(b) is mentioned in section 251(c). Read in context, however, the statutory cross-reference to section 251(b) simply clarifies that the enumerated section 251(c) obligations imposed on incumbent local exchange carriers are in addition to, not in lieu of, those obligations imposed on all local exchange carriers in 251(b). Indeed, section 251(c) is entitled "*Additional Obligations of Incumbent Local Exchange Carriers*," and the text of the provision itself expressly states that the obligations imposed under that

section are "[i]n addition to the duties contained in subsection (b)" (emphasis added). Consequently, the fact that the merger conditions explicitly refer only to section 251(c) demonstrates that the expanded MFN condition applies to the additional substantive obligations imposed on incumbents under section 251(c), and not the separate obligations imposed on all carriers under section 251(b). Otherwise, the condition would have specified section 251(b) as well as (c).

Likewise, there is no basis in the language of the condition, or of the Commission's order adopting those conditions, for the Focal Response's conclusion that the reference to section 251(c) was merely to the "type of agreement" that is subject to that provision. If the Commission wanted to refer to the provision of the Act that describes the requirements for interconnection agreements, it would have cited section 252, which specifies the detailed requirements for such agreements, not section 251(c), which lists a number of discrete obligations imposed on incumbents.

In any event, even if the merger condition could be read to include the provisions of section 251(b), it still would not apply to provisions of agreements that address the payment of compensation for Internet traffic. As the Commission expressly has ruled, the "section 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 1034 (1996) (emphasis added) "Local Competition Order"; see also 47 C.F.R. § 51.703(a) ("Each [local exchange carrier] shall establish reciprocal compensation arrangements for transport and termination of local telecommunications traffic" (emphasis added)). In contrast, "the reciprocal compensation provisions of section 251(b)(5) . . . do not apply to the transport or termination of interstate or intrastate interexchange traffic." Local Competition Order at ¶ 1034. And the Commission expressly has held that "ISP-bound traffic is non-local interstate traffic" and "the reciprocal compensation requirements of section 251(b)(5) of the Act and [the FCC's implementing] rules do not govern inter-carrier compensation for this traffic." *Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689, ¶ 26 n.87 (1999) (emphasis added). While that order was subsequently vacated and remanded for further explanation (which is under consideration by the Commission), the Commission's prior order remains its only previous decision addressing whether section 251(b)(5) applies to Internet traffic. And, as we have explained in the ongoing remand case, there is no reason for the Commission to reach a different conclusion now. Certainly the Focal Response could not have intended to preempt that finding or prejudge the results of the pending proceeding.

Of course, the single issue addressed by the Focal Response does not resolve the issue of whether the disputed provision can be adopted in other states. Verizon also has identified several other reasons why the interconnection agreement in question is not subject to adoption in another state. For example, we have previously explained that (1) the disputed provision expired by its own terms when the Commission released its Declaratory Ruling, and the merger conditions do not permit a carrier to adopt an expired agreement; (2) the expanded MFN conditions do not apply to provisions in agreements that are inconsistent with state laws and regulatory policies of the state in which the MFN request is made, as is the case here; and (3) the expanded MFN provision does not apply to state-specific pricing provisions, such as the provision in question. The Focal Response agreed that these issues needed to be resolved before the agreement could

Response agreed that these issues needed to be resolved before the agreement could be adopted, but, consistent with the express terms of the condition, it appropriately said that these issues were for the applicable state, not the Commission, to resolve.

Nonetheless, the Focal Response only further complicates an already complicated situation as the Commission considers how to resolve the broader issue of whether reciprocal compensation applies to Internet traffic, and it has the potential to further exacerbate an already difficult problem. Accordingly, Verizon asks that you review the Focal Response and clarify that the MFN provisions of the merger conditions apply only to obligations imposed on incumbent local exchange carriers under section 251(c), and do not, therefore, apply to provisions of an agreement that address inter-carrier compensation on Internet traffic.

Sincerely,

A handwritten signature in cursive script, appearing to read "R. Evans".

cc: Carol Matthey
Anthony Dale

March 6, 2001

Ms. Carol E. Matthey
Deputy Chief, Common Carrier Bureau
Federal Communications Commission
Washington, DC 20554

Dear Deputy Chief Matthey:

On January 26, 2001, Birch Telecom, Inc. ("Birch") issued a letter of intent to SBC Communications, Inc. to elect the Oklahoma 271 Agreement ("O2A"). In that letter, Birch also notified SBC of its intention to incorporate additional amendments to the O2A, after the executed agreement was filed with the Oklahoma Corporation Commission. (Attachment A)

On February 19, 2001, Birch notified SBC of its intent to port the Sage Telecom, Inc./Southwestern Bell Telephone Company ("SWBT") Attachment 12, Compensation, from the Texas Public Utility Commission-approved Sage/SWBT Interconnection Agreement ("Sage Attachment") (Attachment B), in accordance with the SBC/Ameritech Merger Conditions.

On February 19, 2001, SBC/Ameritech issued a letter to Birch indicating that SWBT was not "amenable to voluntarily adding the Sage Compensation Appendix from Texas to Birch's Oklahoma Agreement" (see Attachment C). Additionally, this letter also indicates SBC/Ameritech's position that the Sage Attachment was not available for porting under the Merger Conditions as reciprocal compensation provisions are not UNEs, interconnection or service arrangements available for adoption under Section 252(I) of the Federal Telecommunications Act. The SBC/Ameritech letter further explains that the compensation terms Birch is seeking through the Sage Attachment are arbitrated terms and therefore precluded from being ported. Finally, the letter indicates that the terms of the Sage Attachment were awarded to a CLEC that operates exclusively through UNEs, and therefore SWBT is unwilling to port the same terms to Birch.

The purpose of this letter is to seek an interpretation of relevant SBC/Ameritech Merger Conditions governing the ability of a Competitive Local Exchange Carrier to import a negotiated, subsequently approved, attachment to an interconnection agreement from a state within the SBC/Ameritech region.

Section XII, paragraph 43 of the FCC SBC/Ameritech Merger Conditions provides:

Subject to the conditions specified in this Paragraph, SBC/Ameritech shall make available to any requesting telecommunications carrier in the SBC/Ameritech Service Area within any SBC/Ameritech State any interconnection arrangement or UNE in the SBC/Ameritech Service Area within any other SBC/Ameritech State that (1) was negotiated with a telecommunications carrier, pursuant to 47 U.S.C. § 252(a)(1), by an SBC/Ameritech incumbent LEC that at all times during the interconnection agreement negotiations was an affiliate of SBC and (2) has been made available under an agreement to which SBC/Ameritech is a party.

In addition, with respect to the Sage/SWBT Agreement, *Order No. 2 Approving Amendment to Interconnection Agreement*, issued by the Texas Public Utility Commission on February 2, 2000 ("Texas Order") (Attachment D), provides:

The amendments include *negotiated mutually acceptable amendments* to Section 2.2 of the General Terms and Conditions (new); Appendix Pricing – UNE and Appendix Pricing – UNE Schedule of Prices (amended); Appendix Cellular (amended), **Attachment 12: Compensation**; and addition of Attachment 27: FCC Merger Conditions (new). (Emphasis added).

Birch believes that both Paragraph 43 of the SBC/Ameritech Merger Order and the Texas Order approving the Sage Attachment provide clear and convincing evidence to support Birch's right to incorporate the Sage Attachment from Texas into its agreements in Texas, Oklahoma, Kansas and Missouri. Birch believes the SBC-Ameritech Merger Conditions contemplated the very election Birch has sought from SBC. Further, Birch asserts that the Texas Order is clear in its conclusion that the Sage Attachment was the result of a mutually acceptable negotiation between Sage and SWBT.

Birch is also aware that on December 22, 2000, the Common Carrier Bureau ("CCB") issued a nearly identical interpretation to Focal Communications Corporation ("Focal") with respect to the Bell Atlantic/GTE Merger Conditions (Attachment E). Under the scenario addressed in the letter, Verizon had asserted to Focal that the most-favored nation ("MFN") language of the Bell Atlantic/GTE Merger Order excluded the portability of provisions addressing reciprocal compensation. It is clear from the CCB's response letter that Verizon was incorrect in its assertion, and in fact Verizon's position was inconsistent with the underlying purpose of the MFN provisions.

Therefore, Birch respectfully requests an interpretation of SBC's obligation to allow Birch to port the aforementioned Sage Attachment into its current and/or future interconnection agreements in Oklahoma, Texas, Kansas and Missouri, consistent with the obligations enumerated in the FCC SBC/Ameritech Merger Conditions.

Thank you in advance for your prompt attention to this matter.

Very truly yours,

John M. Ivanuska
Vice President – Regulatory & Carrier Relations

cc: Ms. Radhika Karmarkar
Assistant Chief
Market Disputes Resolution Division
Enforcement Bureau
Federal Communications Commission



January 26, 2001

Marianne Kline
Southwestern Bell Telephone Company
Contract Administration
311 S. Akard
4 Bell Plaza, 9th Floor
Dallas, TX 75202

Re: Election of Oklahoma Interconnection Agreement

Dear Ms. Kline:

Enclosed please find the executed signature page of the Interconnection Agreement between Southwestern Bell Telephone Company and Birch of Oklahoma, Inc. This agreement will supercede our current Interconnection Agreement in Oklahoma.

Additionally, as discussed with Lisa Dabkowski, Birch reminds you that once the executed Agreement has been filed with the Oklahoma Commission for approval, Birch will amend the O2A as follows:

1. Amend Attachment 12: Compensation to substitute the Attachment 12 from the Sage Telecom, Inc./SWBT Texas Interconnection Agreement; and
2. Amend Attachment 25: xDSL to include the acceptance testing language that is available today in our current Interconnection Agreement.

Thank you for your attention to this matter. Please call if you have any questions or concerns.

Sincerely yours,

John Ivanuska
Vice President, Interconnection
& Carrier Relations

cc: Patti Kettler
Rina Hartline

John Chuang
Lisa Dabkowski - SBC



February 19, 2001

Kathy Karavidas
SBC Communications, Inc.
350 N Orleans, Fl 3
Chicago, IL 60654

**Re: Election of Attachment 12 from the Sage Telecom, Inc./SWBT Texas
Interconnection Agreement.**

Dear Kathy:

Pursuant to the FCC Merger Conditions adopted on October 6, 1999, and incorporated by reference in our interconnection agreements in Texas, Missouri, Kansas and Oklahoma (collectively referred to herein as "Interconnection Agreements"), Birch requests amendments to our Interconnection Agreements to incorporate the Attachment 12 from the Sage Telecom, Inc./SWBT Texas interconnection agreement.

Section XII, paragraph 43 of the FCC Merger Conditions provides:

Subject to the conditions specified in this Paragraph, SBC/Ameritech shall make available to any requesting telecommunications carrier in the SBC/Ameritech Service Area within any SBC/Ameritech State any interconnection arrangement or UNE in the SBC/Ameritech Service Area within any other SBC/Ameritech State that (1) was negotiated with a telecommunications carrier, pursuant to 47 U.S.C. § 252(a)(1), by an SBC/Ameritech incumbent LEC that at all times during the interconnection agreement negotiations was an affiliate of SBC and (2) has been made available under an agreement to which SBC/Ameritech is a party.

Therefore, as a negotiated interconnection arrangement in Texas, the Sage Attachment 12 must be made available in Texas, Missouri, Kansas and Oklahoma. Please provide me with three (3) executed signature pages for each of the Amendments so that Birch can execute and file these Amendments in a timely fashion.

Thank you for your attention to this matter.

Sincerely yours,

John Ivanuska
Vice President, Interconnection
& Carrier Relations